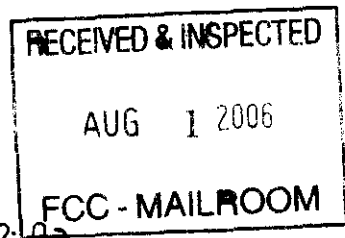


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DEPARTMENT OF THE PUBLIC ADVOCATE

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July 31, 2006

VIA OVERNGIHT MAIL

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capital Heights, MD 20743


**Re: Application for Review In the Matter of the Petition for Waiver of the
Commission's Price Cap Rules for Services Transferred from VADI in the
Telephone Companies
WCB/Pricing File No. 06-10, DA 06-1238**

Dear Secretary Dortch:

The New Division of the Rate Counsel ("Rate Counsel") hereby files the enclosed Reply Comments to Verizon's Opposition in the above proceeding. Enclosed are an original and five copies. Please stamp one copy and return in the enclosed envelope.

Very truly yours,

SEEMA M. SINGH, ESQ.
RATE COUNSEL

By: 
Christopher J. White, Esq.
Deputy Ratepayer Advocate

Cc: Service list (*via overnight mail*)

UNABCD 02

Certificate of Service

On this 31st of July 2006, I served by overnight delivery a copy of the Rate Counsel's Reply to Verizon Opposition to the Application for Review on the following:

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Christopher J. White, Esq.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter

Petition for Waiver of the Commission's
Price Cap Rules for Services Transferred
From VADI to the Telephone Companies

WCB/Pricing File No.06-10
DA 06-1238

**REPLY COMMENTS TO VERIZON'S OPPOSITION TO THE
APPLICATION FOR REVIEW FILED BY THE
NEW JERSEY DIVISION OF THE RATE COUNSEL**

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July 31, 2006

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter

Petition for Waiver of the Commission's
Price Cap Rules for Services Transferred
From VADI to the Telephone Companies

WCB/pricing File No.06-10
DA 06-1238

**REPLY COMMENTS TO VERIZON'S OPPOSITION TO THE
APPLICATION FOR REVIEW FILED BY THE
NEW JERSEY DIVISION OF THE RATE COUNSEL**

INTRODUCTION

The New Jersey Division of the Rate Counsel ("Rate Counsel", formerly known as the New Jersey Division of the Ratepayer Advocate,¹ hereby files its response to

¹ / Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now the Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jerseyans who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Christine Todd Whitman's Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at *N.J.S.A.* 13:1D-1, *et seq.* The mission of the Ratepayer Advocate is to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory. In addition, the Ratepayer Advocate works to insure that all consumers are knowledgeable about the choices they have in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (*N.J.S.A.* §§ 52:27EE-1 *et seq.*). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest," *N.J.S.A.* § 52:27EE-57, *i.e.*, an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." *N.J.S.A.* §52:27EE-12, and the office of the Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of the Rate represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel participates in Federal and state administrative and judicial proceedings.

Verizon's Opposition to the Rate Counsel's Application for Review ("AR") in accordance with Section 1.115 of the Federal Communications Commission's ("Commission's") rules.² The Rate Counsel seeks review of the *Order* of the Pricing Policy Division of the Wireline Competition Bureau ("Bureau"), issued on June 8, 2006, in which the Bureau granted Verizon's request for a limited waiver of section 61.42(g) for purposes of the 2006 annual access tariff filing.³ The Bureau's *Order* was released on June 8, 2006. The Rate Counsel filed its Application for Review dated July 6, 2006, and Verizon filed its Opposition to the Rate Counsel's Application on July 21, 2006.

EXECUTIVE SUMMARY

For the reasons discussed below, the Rate Counsel submits that the Bureau's decision should be vacated because (1) the Bureau exceeded its authority by the grant of five successive waivers that has the effect of changing the price cap regime that can only be done by the Commission, (2) Verizon failed to submit empirical evidence to support its request for a temporary extension of the waiver of § 61.42(g) for the 2006 annual access tariff filing, (3) Verizon failed to submit any evidence and the record fails to show good cause for the grant of the waiver, (4) the Bureau failed to ensure that all of the parties had the opportunity to review and comment on all of the *ex parte* filings, resulting in a denial of due process which warrant vacating the *Order*, and (5) the *Order* lacks a reasoned basis and is otherwise arbitrary and capricious.

² / See 47 C.F.R. § 1.115.

³ / *I/M/O Petition for Waiver of the Commission's Price cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing File No. 06-10, Order adopted June 8, 2006 ("*Order*").

The Rate Counsel respectfully asks that the Commission issue to:

- (1) vacate the *Order*,
- (2) direct the Bureau to suspend, investigate and issue an accounting *Order* for Verizon's 2006 annual access tariffs filing and initiate an investigation as to whether *exogenous* adjustments are necessary due to the regulatory changes implemented since 2001 and to remedy the error in granting serial waivers, thereby correcting harms to consumers from the grant to Verizon of perpetual waivers, and
- (3) grant such other relief as the Commission deems appropriate.

BACKGROUND

On November 30, 2001, Verizon filed a petition for waiver of:

(a) Section 61.42(g), in *Order* to exclude its advanced services from price cap baskets; and (b) Section 61.38, so that it may file tariff modifications without cost support; and (c) Section 61.49, so that it may file tariff transmittals without certain supporting information. On September 26, 2001, the Commission granted Verizon's request to re-integrate, on an accelerated basis, Verizon Advanced Data Inc.'s ("VADI") advanced services assets into the Verizon Telephone Companies.⁴ The Commission subsequently initiated a rulemaking to consider whether incumbent local exchange carriers should be treated as non-dominant in the provision of advanced services.⁵ Subsequently, since 2001, Verizon has filed on an annual basis for the past five years a Petition to Extend

⁴ / *Application of GTE Corporation and Bell Atlantic Corporation For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Order, DA 01-2203 (rel. Sept. 26, 2001).

⁵ / *FCC Initiates Proceeding to Examine Regulatory Treatment of Incumbent Carriers' Broadband Services*, Public Notice (Dec. 12, 2001). *See also*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17FCC Rcd 3019 (2002) ("Broadband Dom/Non-Dom NPRM")

Waiver of Section 61.42(g) of the Commission's Price Cap Rules for services transferred from VADI to the Verizon telephone companies. In the interim and to date the Bureau has granted Verizon a total of 5 waivers over the past five years,⁶ simply on the premise that proceedings to determine such regulatory treatment remains pending and therefore, this waiver remains in the public best interest.

1. At the outset although Verizon attempts to downplay the importance and potential impact of the proceedings currently pending in court and before the Commission, the potential impact of these matters should not be ignored by the Commission.⁷ The fact remains that the waiver grant may impact Verizon's rates and result in lowering of price caps, and subsequent adjustments to future filings, so as to preclude "overearnings." The Commission has the authority to remedy an error by the Bureau and require subsequent adjustments in the rate cap regime.⁸ Moreover, Verizon's claim that the Bureau has the authority to issue a waiver is undercut by the Commission's recent action in *I/M/O Petition of AT&T, Inc. for Waiver of the Commission's Rules to Treat Certain Local Number Portability Costs as Exogenous*

⁶ / See *Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38, and 61.49 of the Commission's Rules*, Order, 17 FCC Rcd 11010 (2002) ("Sections 61.42(g), 61.38, 61.49 Waiver Petitions"); *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules*, Order 18 FCC Rcd 6498 (2003) ("Verizon Section 61.42(g) Waiver Petition"); *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon telephone Companies*, Order 18FCC Rcd 7095 (2004) ("2004 VADI Waiver Order"); *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, Order, 20 FCC Rcd 8900 (2005) ("2005 VADI Waiver Order").

⁷ / See Verizon Opposition, at 5.

⁸ / *Verizon Telephone Companies v. FCC*, ____ F.3d ____ (D.C. Cir. 2006) (*slip opinion* pp 19-20 and footnote 2, therein).

*Costs Under Section 61.45(d).*⁹ In that proceeding, the Commission issued the Waiver Order not the Bureau and it dealt with price cap regulation. In addition, Verizon also asserts for the first time in this opposition that had it “rushed into detariffing, it might have avoided the need for a waiver altogether, but at the price of harming its own customers.”¹⁰ Verizon’s failure to raise the argument below now precludes it from raising the argument in this opposition.

2. Similarly, Verizon’s position that the Bureau was not required to seek evidence from Verizon to support its assertions is simply wrong. In addition, the Rate Counsel disagrees with Verizon that the Bureau is under no obligation to compel the production of documentary evidence. In discussing the scope of review under the “arbitrary and capricious” standard, the Court found that an agency “must examine the relevant data and articulate a satisfactory explanation for its actions including a ‘rational connection between the facts found and the choice made.’” *See Motor Vehicle Manufacturers Association of the United States, Inc., et al. v. State Farm Mutual Automobile Insurance Co.*¹¹ Moreover, while agencies have discretion to determine the types of evidence they consider persuasive, the fact remains that there has been no evidence presented in Verizon’s Petition except for blanket assertions made by Verizon.

⁹ / *M/O Petition of AT&T, Inc. for Waiver of the Commission’s Rules to Treat Certain Local Number Portability Costs as Exogenous Costs Under Section 61.45(d)*, CC Docket No. 95-116, FCC 06-97, Order (rel. July 10, 2006).

¹⁰ / See Verizon Opposition at 7.

¹¹ / *Motor Vehicle Manufacturers Association of the United States, Inc., et al. v. State Farm Mutual Automobile Insurance Co.*¹¹ 463 U.S. 29, 43 (1983).

The Court has frequently reiterated that “an agency must cogently explain why it has exercised its discretion in a given manner.” *Id* at 49.¹²

3. The Rate Counsel notes that the FCC itself in addressing the waiver standard has found that the Commission will adhere strictly to its rules unless a party can demonstrate that in the public interest the rule should be waived.”¹³ Furthermore, the Commission may only waive a provision of its rules for “good cause shown.”¹⁴ In *Tandy Corporation*, the Commission reaffirmed that “the party petitioning the Commission for a waiver bears the burden of showing good cause: ‘[a]n applicant [for a waiver] faces a high hurdle even at the starting gate.’”¹⁵ In addition, the Commission stated that “the Commission must take a “hard look” at applications for waivers¹⁶ and must consider all relevant factors when determining if good cause exists.¹⁷ The Commission further observed that “[F]inally, ‘[t]he agency must explain why deviation better serves the public interest, and articulate the nature of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operation.”¹⁸

¹² / See also, *Atchinson, T. & S. F. R. Co. v. Wichita Bd. Of Trade*, 412 U.S., at 806; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 (1965).

¹³ / In the Matter of *Tandy Corporation, Walker Equipment Company, Ameriphone, Inc., and Ultratec, Inc., Request for Waiver of Volume Control Reset*, 47 C.F.R. §68.317(f), NSD-L-00-17, NSD-L-00-22 NSD-L-00-63, NSD-L-00-193, Memorandum Opinion and Order, (rel. March 5, 2001), (“*Tandy Corporation*”), citing to *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964).

¹⁴ / *Id* at 2. See also, 47 C.F.R. §1.3.

¹⁵ / *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁶ / *Id.*

¹⁷ / *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹⁸ / *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

While it is well established that the Commission may waive any provisions of the rules, a waiver is “permissible where particular facts would make strict compliance inconsistent with the public interest.” *AT&T Corp., v. FCC*.¹⁹ The Commission concluded that “waivers were necessary to permit the LECs to correct the errors arising solely from their compliance with the staff’s legally deficient [RAO Letter 20} order.” Order, 20 F.C.C.R. at 7695. As the Court exhorted, “when the Bureau commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made.”²⁰ While the Rate Counsel agrees that the Commission has the discretion to grant waivers, it reemphasizes that Verizon has failed to submit empirical evidence to support its bare assertions of hardship, or that the grant of waiver is in the public interest.²¹ Therefore, regardless of how Verizon attempts to couch its argument, there is simply no basis for keeping any broadband loops, including those in Verizon’s Tariff No. 20, free from price caps,²² and the lack of empirical support and evidence in the record precludes the Bureau from determining that a party has shown “good cause” to sustain a grant of Verizon’s waiver. The Commission should vacate the Bureau’s error.

¹⁹ / *AT&T Corp., v. FCC, et al.*, ___ F. 3d ___ (D.C. Cir. 2006), (slip opinion at 8) citing to *Northeast Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990), (slip opinion at 12).

²⁰ / *D.C. Court in AT&T v. FCC et al.*, ___ F. 3d ___ (D.C. Cir. 2006), citing to *Exxon Co. v. FERC*, 182 F. 3d 30 (D.C. Cir. 1999) (quoting *Public Utils. Comm’n of Cal. v. FERC*, 988 F. 2d 154, 168 (D.C. Cir. 1993); See also, *I/M/O Petition of AT&T, Inc. for Waiver of the Commission’s Rules to Treat Certain Local Number Portability Costs as Exogenous Costs Under Section 61.45(d)*, CC Docket No. 95-116, FCC 06-97, Order (rel. July 10, 2006).

²¹ / *AT&T Corp., v. FCC, et al.*, ___ F. 3d ___ (D.C. Cir. 2006), (slip opinion at 12) citing to *Northeast Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990).

²² / Time Warner March 10, 2006, Reply Comments at 5.

4. Verizon's contrived discussion on the issue of substantial evidence, in light of the fact that they have submitted little or no probative data, should be ignored. On this issue, the rule of law is clear, "an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *See Motor Vehicle Manufacturers Association of the U.S., Inc., et al. v. State Farm Mutual Automobile Insurance Co., et al.*, at 42, 43.²³ Verizon's Petition is devoid of any hard evidence to support the majority if not all of its assertions. Likewise, Verizon's statement that the Bureau is not required to seek evidence to support the assertions of a party seeking a waiver is simply wrong. Verizon contends that uncorroborated and untested testimony and hearsay testimony constitute substantial evidence. The grant of the waiver is not an adjudication and Verizon's reliance on the substantial evidence test is misplaced. The Commission is obligated to review a party's underlying data supporting a party's submissions. Once again, the primary problem in Verizon's Petition is the dearth of evidence, data and/or information submitted in support of its Petition.

Similarly, contrary to Verizon's assertion, a Commission order directing the Bureau to suspend, investigate and issue an accounting Order for Verizon's 2006 annual access tariffs filing would certainly not be unlawful. Should the full Commission decide to vacate Verizon's request for a waiver, Verizon would have to re-file tariffs. The Commission is well within its statutory authority pursuant to 47 U.S.C. §204(a)(1), to suspend, investigate and issue an accounting Order for Verizon's 2006 annual access

²³ / *Motor Vehicle Manufacturers Association of the U.S., Inc., et al. v. State Farm Mutual Automobile Insurance Co., et al.*, 463 U.S. 29, at 42, 43; See also, 77 L. Ed. 2d 443, at 458; *Burlington Truck Lines, Inc., v. U.S.* 371 U.S. 156, 168 (1962).

tariff filings. Verizon should be aware of a similar issue in connection with the use of an accounting rule, “add-back,” in addressing rates charged by local telephone exchange carriers for access to their networks. In *Verizon Telephone Companies v. FCC*,²⁴ Verizon unsuccessfully argued that the FCC unreasonably required Verizon’s 1993 and 1994 tariffs to comply with the add-back rule for those years after those tariffs were filed. The Court found that the Commission had reasonably applied its “quasi-legislative authority,”²⁵ finding that “Congress had expressly authorized the FCC to do what petitioners urge it cannot: suspend petitioner’s tariffs upon their filing, subject petitioners to an accounting order to track revenue earned under the tariffs, and determine at a later date whether petitioners’ tariffs contain “just and reasonable” rates.”²⁶

Verizon’s assertion that once a tariff is “deemed lawful” the Commission cannot issue an investigation and issue an accounting Order is also wrong. Courts have long drawn a distinction between what constitutes “legal” and “lawful” tariffs.²⁷ A *lawful* tariff is a tariff that is not only legal, but also contains rates that are “just and reasonable” within the meaning of 47 U.S.C. § 201(b) and filed pursuant to 47 U.S.C. § 204(a)(1), § 205, § 208 and § 204(a)(3). *See also, Virgin Islands Telephone Corp., v. FCC*.²⁸ While carriers charging rates under a “lawful tariff” are immunized from refund liability,²⁹ as refunds would be an impermissible form of retroactive ratemaking, other prospective

²⁴ / *Verizon Telephone Companies v. FCC*, ____ F. 3d ____ (D.C. Cir. 2006).

²⁵ / *Id.*, D.C. Court (slip opinion pp. 18-20) *citing to, Global NAPs, Inc., v. FCC*, 247 F.3d 252, 259 (D.C. Cir. 201); *See also* 47 U.S.C. §204(a)(1).

²⁶ / 47 U.S.C. §204(a)(1).

²⁷ / *Arizona Grocery Co., v. Atchinson, Topeka, & Santa Fe Ry. Co.*, 284 U.S. 370, at 384 (1932).

²⁸ / *Virgin Islands Telephone Corp., v. FCC*, ____ F. 3d ____ (slip opinion at 3-5) (D.C. Cir. 2006).

²⁹ / *ACS of Anchorage*, 290 F.3d 403 (D.C. Cir. 2002) at 411.

remedies are available against carriers charging “lawful tariffs” which are later found to be unreasonable.³⁰ See, *Verizon Telephone Co. v. FCC*,³¹ and *Virgin Islands Telephone Corp., v. FCC*³².

5. Verizon misinterprets the Rate Counsel’s position on the need for the Bureau to examine the impact of Verizon’s exogenous cost adjustments. There have been numerous regulatory events which have occurred since 2001 that would qualify as exogenous events. Exogenous events can result in adjustments that can either increase or decrease rates for such regulation changes absent such review, Verizon’s claim for the grant of the waiver (that headroom exists) is simply unsupported. The Bureau’s acceptance of such assertions are the epitome of arbitrary, capricious and non-reasoned decision making. Verizon has provided no data on which the Bureau could make an informed analysis and properly assess the impact on rates. Simply keeping the rates the same does not mean that the rates should not be lower. Other action like the separation freeze has distorted rate caps at the federal level.³³

³⁰ / *Id.* See also, *Streamlined Tariff Order*, 12 F.C.C.R. at 2182-83; *Virgin Islands Telephone Corp., v. FCC*, ___ F. 3d ___ (slip opinion at 5-6) (D.C. Cir. 2006).

³¹ / See *Verizon Supra* (slip opinion pp. 18-20).

³² / See *Virgin Islands id.* (slip opinion at 5-6).

³³ / *In the Matter of BellSouth Corporation and AT&T Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission’s Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T Inc.*, WC Docket No. 06-74, Application for Consent of Transfer of Control, filed March 31, 2006 (“Application”). See Reply Declarations of Dennis W. Carlton and Hal S. Sider. See, www.fcc.gov/transaction/att-bellsouth.html.

CONCLUSION

For the foregoing, the Rate Counsel respectfully asks the Commission to:

- (1) vacate the Bureau's *Waiver Order*,
- (2) direct the Bureau to suspend, investigate and issue an accounting Order for Verizon's 2006 annual access tariffs filing and initiate an investigation as to whether *exogenous* adjustments are necessary due to the regulatory changes implemented since 2001 and to remedy the error in granting serial waivers, thereby correcting harms to consumers from the grant to Verizon of perpetual waivers, and
- (3) grant such other relief as the Commission deems appropriate.

Respectfully submitted

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Dated: July 31, 2006